No. 05-409

IN THE

Supreme Court of the United States

CARL KIRCHER, ET AL.,
Petitioners,

v.

PUTNAM FUNDS TRUST, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF LAW PROFESSORS ARTHUR R. MILLER AND E. FARISH PERCY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief is limited to Question 1 in the Petition for a Writ of Certiorari. That question is as follows:

Whether the court of appeals had jurisdiction, contrary to the holdings of three other circuits, to review a district court order remanding for lack of subject-matter jurisdiction a suit removed under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), notwithstanding 28 U.S.C. § 1447(d)'s bar on appellate review of remand orders based on lack of subject-matter jurisdiction and the district court's conclusion that petitioners' claims are not preempted by and thus not removable under SLUSA.

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INTERESTS OF *AMICI CURIAE*[1]

Professor Arthur. R. Miller is the Bruce Bromley Professor of Law at the Harvard Law School. He has devoted his teaching and writing career to an understanding of federal courts, civil procedure, and federal practice. Among his numerous publications are the leading treatise in federal practice and the leading casebook in civil procedure: Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* (West 2005); Jack H. Friedenthal, Arthur R. Miller, John E. Sexton & Helen Hershkoff, *Civil Procedure: Cases and Materials* (Thomson West 9th ed. 2005). In addition, he has written numerous articles and consulted on numerous cases raising novel issues of federal practice and procedure.

Assistant Professor E. Farish Percy joined the faculty at the University of Mississippi School of Law in 2001 and teaches Civil Procedure, Torts and Insurance.[2] Much of her recent research has been devoted to the issue of federal court

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[1] This brief of *amici curiae* is submitted on behalf of Professors Arthur R. Miller and E. Farish Percy. The parties have consented to the filing of this brief. The letter reflecting petitioners' consent is being filed with the office of the Clerk contemporaneously with the filing of this brief; the letter reflecting respondents' consent is being filed with the office of the Clerk by counsel for respondents directly. In accordance with Rule 37.6, counsel states that this brief was authored by counsel with the input and assistance of *amici*, and was not authored in whole or in part by counsel for any party. No person or entity, other than *amici* and their counsel submitting this brief on behalf of *amici*, made a monetary contribution to the preparation or submission of the brief.

[2] Professor Percy obtained her J.D. from the University of Virginia in 1991, where she was a member of the Virginia Law Review and Order of the Coif. After graduating, she clerked for Judge E. Grady Jolly of the United States Court of Appeals for the Fifth Circuit. Professor Percy practiced law for eight years with the Tollison Law Firm, P.A. in Oxford, Mississippi, where she concentrated in tort litigation, commercial litigation, and appellate practice. She tried numerous civil cases in state and federal courts in Mississippi and briefed and argued several appellate cases before the United States Court of Appeals for the Fifth Circuit and the Mississippi Supreme Court.

jurisdiction. She has recently written two law journal articles proposing a framework to be used by federal district courts when evaluating allegations of fraudulent joinder in cases where removal is based on federal diversity jurisdiction.[3] In both, she emphasizes that the fraudulent joinder doctrine should be structured so as to ensure that the federal courts do not exceed their limited statutory jurisdiction and also to address the federalism concerns raised when cases are removed from state to federal court.

Having devoted their careers to teaching and writing about the federal courts and working for their improved administration, *amici* have a keen interest in seeing that those courts function efficiently. It is equally important that the lower federal courts function only as Congress has authorized. Unless the court below is reversed, appellate panels (at least in the Seventh Circuit) will continue to entertain appeals that Congress has specifically prohibited.

SUMMARY OF ARGUMENT

The Securities Litigation Uniform Standards Act of 1998 ("SLUSA") preempts certain state law securities cases and makes those cases removable to federal court. If, following an attempted removal under SLUSA, the federal district court determines that the plaintiffs' claims are not preempted and accordingly not subject to removal, the district court must remand the action to state court. Congress has prohibited appellate review of a district court's order remanding a removed case to state court for lack of subject matter jurisdiction. 28 U.S.C. § 1447(d). Until the ruling by the court below, the circuit courts that have considered the matter had determined that section 1447(d) precluded appellate review of a remand order under SLUSA.

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[3] E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 Iowa L. Rev. __ (forthcoming late 2005); E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 Harv. J.L. & Pub. Pol'y __ (forthcoming March 2006).

The Seventh Circuit, however, found for the first time that such a remand order is reviewable. In a ruling that conflicts with holdings in three other circuits,[4] the court below held that section 1447(d) does not apply to a district court's remand ruling if the action was removed to federal court under SLUSA. The court reasoned that SLUSA vests the federal district courts with subject matter jurisdiction over all proceedings falling within the definition of a "class covered action" — even if the claims are not preempted under SLUSA — and that a district court remand of the action accordingly could not be premised upon lack of subject matter jurisdiction. As characterized by the Seventh Circuit, an action removed to federal court under SLUSA, even if it must be remanded because it falls outside of those actions that SLUSA preempts, is "a case properly removed and remanded only when the federal job is done."

This Court should grant certiorari with respect to this issue. The ruling below creates a clear conflict among the circuits. Although the court below sought in its decision to belittle the magnitude of the conflict, this rift between the circuits undermines the very purpose of SLUSA. Regardless of which circuit reached the correct result, the conflict among the circuits provides an incentive to plaintiffs to file actions subject to possible SLUSA removal in New York or California, rather than Illinois, merely because a remand of such actions after removal will not be subject to review in New York or California, but would be subject to review in Illinois. Certiorari should also be granted in this case because the court below erred, and premised its ruling upon a tortured construction of the statute and a cavalier rejection of well-reasoned contrary rulings in other circuits.

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[4] *See Williams v. AFT Enters., Inc.*, 389 F.3d 1185 (11th Cir. 2004); *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 123 (2d Cir. 2003); *Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1119 (9th Cir. 2002).

ARGUMENT

From the inception of the Republic, remand orders for lack of subject matter jurisdiction or for defects in the removal procedure have been unreviewable on appeal except during a short-lived period between 1875 and 1887. *United States v. Rice*, 327 U.S. 742, 749 (1946) ("save for a brief interval under § 5 of the Act of 1875, . . . an order of remand was not appealable"); *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 840 (3d Cir. 1991) ("[w]ith the brief exception . . . of the period between 1875 and 1887, Congress, by adopting section 1447(d) and its statutory predecessors," prohibited the review of remand orders). The time-honored bar to appellate review of remand orders rests upon Congress's explicit legislative choice and "policy of not permitting interrupting of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *Rice*, 327 U.S. at 751.

Prior to this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), the statutory prohibition "precluded review of all remand orders, regardless of the reasons underlying the decision to remand." *TMI Litig.*, 940 F.2d at 840. "As we explained in *Thermtron*, § 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995) (citation omitted). "Although the rule that most remand orders are not subject to review remains, *Thermtron* made clear that the seemingly unequivocal language of section 1447(d), may, in extraordinary circumstances, give way to permit appellate consideration of certain categories of remand orders." *TMI Litig.*, 940 F.2d at 841. When "a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction — the grounds for remand recognized by § 1447(c) — a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d)." *Things Remembered,*

516 U.S. at 127-28. Thus, even after *Thermtron*, there remain "broad restrictions on the power of federal appellate courts to review district court orders remanding removed cases to state court." *Id.* at 127.

Moreover, and of particular concern in the present case, section 1447(d)'s bar to appellate review applies "regardless of whether removal was effected pursuant to § 1441(a)" (which is the general removal statute) or "under *any other statutes*, as well." *Things Remembered*, 516 U.S. at 128 (quoting Rice, 327 U.S. at 752). "Absent a clear statutory command to the contrary, we assume that Congress is 'aware of the universality of th[e] practice' of denying appellate review of remand orders when Congress creates a new ground for removal." *Id.*

Congress has provided such a "clear statutory command" in a few instances. For example, section 1447(d) itself provides that civil rights cases "removed pursuant to section 1443 of this title ***shall be reviewable*** by appeal or otherwise." Similarly, the recently enacted Class Action Fairness Act of 2005,[5] Pub. L. No. 109-2, 119 Stat. 4, provides that, "notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order." Section 5(a), 119 Stat. 12 (to be codified at 28 U.S.C. § 1453(c)(1)).

SLUSA contains no such "clear statutory command" authorizing the review of SLUSA remand orders. Rather, SLUSA merely authorizes the removal of a specific class of securities cases:

> Removal of covered class actions
>
> Any covered class action brought in any State court involving a covered security, ***as set forth in subsection (b) of this section***, shall be removable to the Federal

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[5] The Class Action Fairness Act makes certain state court class actions commenced on or after February 18, 2005, removable to federal court.

> district court for the district in which the action is pending, and shall be subject to subsection (b).

15 U.S.C. § 77p(c) (emphasis added); *accord id.* § 78bb(f)(2).

In order to rationalize its ruling, the court below disassociated the subsection (c) analysis from the subsection (b) requirements. The plain words of the statute, however, require the district court to evaluate whether claims fall within the ambit of subsection (b) in order to determine whether they are removable in the first instance. The "as set forth in subsection (b)" language is clearly both mandatory and delimiting. Had Congress intended to authorize the removal of every covered class action involving a covered security, it could easily have provided that "any covered class action brought in any State court involving a covered security shall be removable." If, as the court below held, this were the proper interpretation of subsection (c), then the words "as set forth in subsection (b) of this section" have no distinct meaning of their own.[6] Of course, canons of construction generally preclude such a conclusion which renders statutory language superfluous. *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 233 (2003) ("[c]ourts should disfavor interpretations of statutes that render language superfluous") (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)).

The subset of cases "as set forth in subsection (b)" consists of those "covered class actions" which SLUSA also preempts. Subsection (b) of the statute provides:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may

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[6] As purely a matter of English grammar, the language "as set forth in subsection (b) of this section" could be understood to modify the immediately preceding phrase, "a covered security." In context, however, this interpretation makes no sense because subsection (b) does not "set forth" a description of covered securities. Instead, subsection (b) sets forth a category of cases which cannot "be maintained in any State or Federal court . . . ." The conclusion that the "as set forth" language describes a subset of "covered class actions involving a covered security" is therefore inescapable.

> be maintained in any State or Federal court by any private party alleging —
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b); *accord id.* § 78bb(f)(1). Subsection (b) thus "sets forth" a defined set of covered class actions and preempts them. Subsection (c), in turn, makes those preempted class actions removable: "preemption and the existence of subject matter jurisdiction . . . are the opposite sides of the same coin." *Spielman*, 332 F.3d at 132 (Newman, J., concurring).

The kind of preemption that SLUSA employs is a species of federal jurisdiction that federal courts have recognized under the "complete preemption" doctrine.

> When [a] federal statute completely pre-empts [a] state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. This claim is then removable under 28 U.S.C. § 1441(b), which authorizes any claim that "arises under" federal law to be removed to federal court.

Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003). Other lower courts have recognized that SLUSA preemption is "complete preemption." *See, e.g., Spielman*, 332 F.3d at 123 ("SLUSA was intended to completely preempt the field of *certain types* of securities class actions") (emphasis in original); *Abada*, 300 F.3d at 1119 ("the district court was required to decide whether Abada's claims were completely preempted by SLUSA").

Because a district court's removal jurisdiction under SLUSA extends only to those covered class actions which SLUSA preempts, a district court's remand of a case to state

court on the grounds that SLUSA does not preempt the case is, *a priori*, a remand for lack of removal jurisdiction. The plain language of SLUSA permits no other conclusion. "Congress could not have spoken more clearly." *Spielman*, 332 F.3d at 123. As a result, a remand order based on the conclusion that SLUSA does not preempt the case is the very kind of remand for lack of subject matter jurisdiction which Congress has forbidden appellate courts to review on "appeal or otherwise." 28 U.S.C. § 1447(d).

The Seventh Circuit's conclusion that SLUSA remand orders are not remands for lack of subject matter jurisdiction (and are thus reviewable on appeal) depends upon an untenable reading of SLUSA. According to the appellate court, "[b]ecause plaintiffs represent more than 50 investors, this is a 'covered class action' and a federal judge is not only authorized but also required to decide whether any court may entertain the litigation." *Kircher v. Putnam Funds Trust*, 373 F.3d 847, 849 (7th Cir. 2004). For reasons already discussed, this interpretation of SLUSA's removal provision is not just a misreading of the statute, it is a judicial revision of the statute which eliminates the phrase "as set forth in subsection (b)."

The Second, Ninth and Eleventh Circuits' holdings that SLUSA remand orders are unappealable remands for lack of subject matter jurisdiction are sound. Moreover, the Seventh Circuit's sole criticism of the Second and Ninth Circuits — that those courts were "mesmerized by the word 'jurisdiction'" (*Kircher*, 373 F.3d at 851) — is unfounded. The district court in *Spielman* did *not* expressly remand for lack of subject matter jurisdiction. As a result, the Second Circuit was first required to discern whether the remand order was a remand for lack of subject matter. *Spielman*, 332 F.3d at 128-29 ("the district court never used the words 'subject matter jurisdiction,' 'federal question jurisdiction,' or even 'jurisdiction' when ordering a remand," but "[o]ur reading of the remand order convinces us that the remand could not have been predicated on anything other than the district court's determination that it lacked subject matter jurisdiction under SLUSA"). The Second Circuit thus could not possibly

have been "mesmerized" by the district court's use of a word ("jurisdiction") which the district court never used.

Similarly, in *Abada*, the Ninth Circuit expressly recognized that it was "not bound by the district court's characterization of its authority for remand," and that, if it "concluded that the district court's order was the result of an exercise of discretion, we could review it. However, such is not the case here." 300 F.3d at 1117. The Ninth Circuit recognized that the district court's "resolution of the substantive legal question" of preemption "was a necessary predicate to deciding the existence of subject matter jurisdiction." *Id.* at 1118. Thus, the Ninth Circuit was also not "mesmerized" by a district court's injudicious use of the word "jurisdiction." The issue of appellate jurisdiction was correctly decided in both cases based upon SLUSA's plain language and that of section 1447(d).

CONCLUSION

The Court should grant certiorari to hear this case. The twin issues of SLUSA removal jurisdiction and appellate jurisdiction to review SLUSA remand orders are important ones. The circuits where most securities litigation arises — the Second, Seventh and Ninth — have authoritatively decided the issue, and there is no reason to think a better opportunity will present itself for resolving the current circuit conflict. These important jurisdictional issues involve lines of authority that Congress has drawn, lines that should always be drawn bright and clear. They also involve an important issue of federalism. The petition for a writ of certiorari should be granted with regard to Question 1 of the Questions Presented.

Respectfully submitted,

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